

1-8-2018

## State v. Fleming Respondent's Brief Dckt. 45051

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/not\\_reported](https://digitalcommons.law.uidaho.edu/not_reported)

---

### Recommended Citation

"State v. Fleming Respondent's Brief Dckt. 45051" (2018). *Not Reported*. 3999.  
[https://digitalcommons.law.uidaho.edu/not\\_reported/3999](https://digitalcommons.law.uidaho.edu/not_reported/3999)

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

PAUL R. PANTHER  
Deputy Attorney General  
Chief, Criminal Law Division

LORI A. FLEMING  
Deputy Attorney General  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45051
Plaintiff-Respondent,	)	
	)	Shoshone County Case No.
v.	)	CR-2009-114
	)	
JAMES J. FLEMING,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Fleming failed to show any basis for reversal of the district court's order denying his Rule 35 motion for correction of an illegal sentence and his motion for appointment of counsel?

Fleming Has Failed To Show Any Basis For Reversal Of The District Court's Order Denying His Motion For Correction Of An Illegal Sentence And Motion To Appoint Counsel

In 2009, Fleming pled guilty to lewd conduct with a minor under 16 and entered an Alford<sup>1</sup> plea to sexual abuse of a child under the age of 16 years, and the district court imposed

---

<sup>1</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

concurrent unified sentences of 40 years, with 15 years fixed, and 25 years, with 15 years fixed, respectively. (7/20/09 Tr., p.15, Ls.15-22; 37082 R., pp.78-80, 122-25.) Fleming filed a Rule 35 motion for reduction of his sentences, which the district court denied. (37082 R., pp.151-53; 45051 R., p.6.) Fleming appealed and, on August 24, 2010, the Idaho Court of Appeals affirmed Fleming's convictions and sentences and the district court's order denying Fleming's Rule 35 motion for reduction of his sentences. State v. Fleming, 2010 Unpublished Opinion No. 604, Docket No. 37082 (Idaho App., August 24, 2010).

On December 22, 2016, Fleming filed a Rule 35 motion for correction of an illegal sentence and a motion for appointment of counsel. (45051 R., pp.8-9.) The district court entered an order denying both motions on March 30, 2017. (45051 R., pp.93-99.) Fleming filed a notice of appeal timely from the district court's order denying his motions. (45051 R., pp.100-03.)

"Mindful that a motion filed pursuant to Idaho Criminal Rule 35 to correct an illegal sentence cannot be used as a vehicle to challenge an otherwise valid guilty plea and conviction, and can be reviewed only on the face of the record," Fleming nevertheless asserts that the district court erred by denying his Rule 35 motion for correction of an illegal sentence because:

a) he believed he was entering an *Alford* plea to both counts; b) his counsel was ineffective in failing to ensure the prosecutor understood that he would enter an *Alford* plea to both counts; c) he believed the purpose of the *Alford* plea was to allow him to withdraw the plea if the sentence did not come close to what he argued was appropriate; d) the prosecutor committed misconduct by allowing Mr. Fleming to enter into a sham plea agreement; and, e) because of the actions of his trial counsel and the prosecutor, the district court did not have jurisdiction either to accept his guilty plea or to sentence him, rendering his sentence illegal.

(Appellant's brief, pp.2-4 (citing 45051 R., pp.8, 13-38).) Fleming has failed to show any basis for reversal of the district court's order denying his Rule 35 motion for correction of an illegal sentence.

Pursuant to Idaho Criminal Rule 35, a district court may correct a sentence that was imposed in an illegal manner within 120 days after the filing of a judgment of conviction. The court may, however, correct a sentence that is “illegal from the face of the record at any time.” I.C.R. 35(a). Because these filing limitations are jurisdictional, the district court lacks jurisdiction to grant any motion requesting relief that is filed after the time limit proscribed by the rule. State v. Sutton, 113 Idaho 832, 748 P.2d 416 (Ct. App. 1987). Fleming’s Rule 35 motion was filed over seven years after the judgment of conviction was entered. Therefore, the district court had jurisdiction to consider only whether Fleming’s sentence was illegal.

In State v. Clements, 148 Idaho 82, 87, 218 P.3d 1143, 1148 (2009), the Idaho Supreme Court held that “the interpretation of ‘illegal sentence’ under Rule 35 is limited to sentences that are illegal from the face of the record, i.e., those sentences that do not involve significant questions of fact nor an evidentiary hearing to determine their illegality.” An illegal sentence under Rule 35 is one in excess of a statutory provision or otherwise contrary to applicable law. State v. Alsanea, 138 Idaho 733, 745, 69 P.3d 153, 165 (Ct. App. 2003).

The maximum sentence for lewd conduct with a minor under 16 is life in prison, and the maximum prison sentence for sexual abuse of a child under the age of 16 years is 25 years. I.C. §§ 18-1506, -1508. The district court imposed concurrent unified sentences of 40 years, with 15 years fixed, for lewd conduct with a minor under 16, and 25 years, with 15 years fixed, for sexual abuse of a child under the age of 16 years, both of which fall within the statutory guidelines permitted by law. (37082 R., pp.122-25.) Fleming’s sentences are not illegal from the face of the record, and his claims of defects in the underlying proceedings do not fall within the scope of a motion for correction of an illegal sentence pursuant to Rule 35. See, e.g., State v. McDonald, 130 Idaho 963, 965, 950 P.2d 1302, 1304 (Ct. App. 1997) (“[Rule 35] cannot be used

as the procedural mechanism to attack the validity of the underlying conviction.”). Because Fleming’s sentences do not exceed the statutory maximums, and because the sentences are not otherwise contrary to applicable law, Fleming has failed to show any basis for reversal of the district court’s order denying his Rule 35 motion for correction of an illegal sentence.

Fleming next asserts – “mindful that a court may deny a request for the appointment of counsel to assist with pursuing a Rule 35 motion, if the court finds the motion to be frivolous” – that the district court abused its discretion by denying his motion for appointment of counsel. (Appellant’s brief, p.4.) The district court’s decision was appropriate and within the bounds of its discretion, as Fleming’s Rule 35 motion was, in fact, frivolous.

Idaho Code § 19-852(2)(c) governs the appointment of counsel in post-judgment criminal proceedings and requires that counsel be appointed to pursue a Rule 35 motion, “unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding.” I.C. § 19-852(2)(c); see also State v. Wade, 125 Idaho 522, 523, 873 P.2d 167, 168 (Ct. App. 1994). A determination of whether a Rule 35 motion is frivolous for purposes of applying I.C. § 19-852(2)(c) is based on the contents of the motion itself and any accompanying documentation that may support the motion. Wade, 125 Idaho at 525, 873 P.2d at 170. Thus, a district court is within its discretion to deny a request for court appointed counsel under I.C. § 19-852(2)(c) if the court appropriately finds that the claims presented are frivolous after reviewing the contents of the motion. Swisher v. State, 129 Idaho 467, 468-69, 926 P.2d 1314, 1315-16 (Ct. App. 1996).

As set forth above, Fleming made no showing that his sentences were illegal. In its order denying Fleming’s motions for correction of an illegal sentence and for appointment of counsel,

the district court specifically found that Fleming's Rule 35 motion was "frivolous" and "not one 'that a reasonable person with adequate means would be willing to bring at his own expense.'" (45041 R., p.95 (citing I.C. §19-852(2)(c)).) Indeed, because Fleming's sentences are not illegal from the face of the record and his claims did not fall within the scope of a motion for correction of an illegal sentence pursuant to Rule 35, his Rule 35 motion was frivolous. As such, the district court did not abuse its discretion by denying Fleming's motion to appoint counsel to assist with Fleming's frivolous Rule 35 motion, and the court's order denying Fleming's motion for appointment of counsel should be affirmed.

#### Conclusion

The state respectfully requests this Court to affirm the district court's order denying Fleming's Rule 35 motion for correction of an illegal sentence and motion for appointment of counsel.

DATED this 8th day of January, 2018.

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 8th day of January, 2018, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JASON C. PINTLER  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General